STATE OF MICHIGAN

COURT OF APPEALS

DEWITT BUILDING COMPANY, INC., Plaintiff-Appellant,	UNPUBLISHED June 12, 2003
v AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee.	No. 235536 Oakland Circuit Court LC No. 98-008070-CZ

DEWITT BUILDING COMPANY, INC., Plaintiff-Appellee,	
v AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellant.	No. 236945 Oakland Circuit Court LC No. 98-008070-CZ

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a jury trial, in Docket No. 235536, plaintiff appeals as of right from an order granting defendant's motion for partial directed verdict. In Docket No. 236945, defendant appeals as of right from a judgment in plaintiff's favor. We affirm.

Plaintiff's only argument on appeal is that the trial court improperly granted defendant's motion for directed verdict on the issue of consequential damages. We disagree. The trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). A directed verdict is appropriate only when no factual question exists upon which reasonable jurors could differ. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). The appellate court reviews all the evidence presented up to the time of the motion, considers it in a light most favorable to the nonmoving party, and determines whether a question of fact existed. *Id*. at 679.

Plaintiff specifically argues that sufficient evidence was presented for a rational jury to conclude that defendant's failure to pay on an Employment Dishonesty Coverage (EDC) policy caused consequential damages that arose naturally from the failure to pay or that such damages were reasonably within the contemplation of the parties at the time they entered the contract. Consequential damages, including lost profits, are recoverable for a breach of a commercial contract when those damages arise naturally from the breach or can reasonably be said to have been in contemplation of the parties at the time they entered the contract. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 13; 516 NW2d 43 (1994). "Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980).

Plaintiff claims its consequential damages arose naturally from defendant's breach because defendant knew that the failure to pay on the EDC policy would result in bad publicity causing a loss of profits, attorney fees, and damages to its reputation. However, plaintiff failed to establish that the failure to pay an EDC policy claim ordinarily results in bad publicity. No testimony was presented to establish that the breach of an EDC policy would, in the usual course of events, result in bad publicity. Moreover, plaintiff failed to demonstrate that the parties contemplated consequential damages at the time the EDC policy was issued. Plaintiff's owner admitted that he only became concerned about bad publicity well after the policy was issued. Therefore, the trial court properly granted defendant's motion for directed verdict on the issue because plaintiff failed to establish that consequential damages arose naturally from defendant's breach or that the parties contemplated such consequential damages at the time the EDC policy was issued.

Defendant argues on appeal that the trial court erred in denying its motion for partial summary disposition because the EDC policy excludes coverage for indirect losses. We disagree. A trial court's grant or denial of a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is proper when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion for summary disposition, a court must consider the documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

"Exclusions limit the scope of coverage provided and are to be read with the insuring agreement and independently of every other exclusion." *State Farm Mut Auto Ins Co v Roe (On Rehearing)*, 226 Mich App 258, 263; 573 NW2d 628 (1997). Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). "If an insurer intends to exclude coverage under certain circumstances, it should clearly state those circumstances in the section of its policy entitled 'Exclusions.'" *Fragner v American Community Mut Ins Co*, 199 Mich App 537, 540; 502 NW2d 350 (1993). Exclusions that are clear and specific must be enforced. *Group Ins Co v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992).

The EDC policy provides, in relevant part:

> A. General Exclusions: We will not pay for loss as specified below:

> 3. Indirect loss: Loss that is an indirect result of any act or "occurrence" covered by this insurance including, but not limited to, loss resulting from:
>
> > a. Your inability to realize income that you would have realized had there been no loss of, or loss from damage to, Covered property.
> >
> > b. Payment of damages of any type for which you are legally liable. But, we will pay compensatory damages arising directly from a loss covered under this insurance.
> >
> > c. Payment of costs, fees or other expenses you incur in establishing either the existence or the amount of loss under this insurance.
>
> 4. Legal Expenses: Expenses related to any legal action.

While defendant is correct that the EDC policy excludes loss from an "indirect result of any act or 'occurrence' covered by this insurance," the EDC policy does not exclude damages resulting from a failure to pay a claim. An insurer must clearly state policy exclusions. *Fragner*, *supra*. Here, the EDC policy does not contain an exclusion for indirect damages resulting from the insurer's failure to pay claims, therefore, it does not exclude those losses. See *id*.

Moreover, Michigan case law recognizes that a "claim for lost profits is separate from the claims to enforce the insurance contract." *Lawrence*, *supra* at 11, quoting *Salamey v Aetna Cas & Surety Co*, 741 F2d 874, 877 (CA 6, 1984). The exclusion in the EDC policy operates only if plaintiff attempts to enforce an insurance contract. Here, plaintiff is claiming lost profits from a breach of the EDC policy and not under a claim to enforce it. Therefore, the trial court properly denied defendant's motion for summary disposition because there was a genuine issue as to whether plaintiff incurred indirect losses from defendant's failure to pay under the EDC policy.

Defendant next argues that the trial court improperly denied its motions for partial summary disposition, directed verdict, JNOV, and new trial because Burton Gorelick (Gorelick) was not an employee under the EDC policy. We disagree. Summary disposition is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Cacevic (On Remand)*, *supra*. In reviewing the decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Whether to grant new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

An insurance policy is a contractual agreement between the parties. *Meridian Mut Ins Co v Wypij*, 226 Mich App 276, 279; 573 NW2d 320 (1997). Under section C of the EDC policy, an "employee" is defined and excludes "independent contractors." However, "independent contractor" is not defined in the policy. Defendant claims that Gorelick was an independent contractor and, thus, was excluded under the EDC policy. Generally, if an insurance policy uses the term 'employee' but does not define it, a court may determine whether a person was an employee or an independent contractor by use of the economic reality test. *Id*. at 279-280. Here, the definition of "employee" is not helpful in determining Gorelick's employment status, therefore, the economic reality test is helpful in making such determination.

Factors relevant to the economic reality test include: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; (4) performance of the duties toward the accomplishment of a common goal; (5) whether the worker provides his own equipment and materials; and (6) whether the worker holds himself out to the public as ready and able to perform certain tasks. *Id*. at 280-282. The totality of the circumstances must be considered, and no single factor controls. *Id*. at 280. Defendant's argument focuses on the method in which Gorelick was paid and his tax status. Defendant maintains that because Gorelick filed an IRS Form 1099, which identified him as a "non-employee," and because Gorelick's corporation, Century Construction, Limited, received Gorelick's commissions, Gorelick is necessarily an independent contractor.

However, even accepting that Gorelick filed an IRS Form 1099 and that Gorelick received payment by commission, the "totality of the circumstances must be considered, and no single factor controls." *Id*. In response to defendant's motion for partial summary disposition, plaintiff submitted evidence of Gorelick's "employee" status, including his own statement, an affidavit from insurance agent, John Williamson, that indicated that plaintiff's salespeople were employees, and a letter from Williamson to defendant indicating that Gorelick was plaintiff's employee because Michigan law did not permit him to be an independent contractor. Considering that each party provided evidence of different factors relevant to the economic reality test, there was a genuine issue of material fact regarding Gorelick's employment status and the trial court properly determined that defendant was not entitled to partial summary disposition on that basis.

At trial, plaintiff's owner, Robert DeWitt, testified that he had control of Gorelick's duties and had the right to hire, fire, and discipline Gorelick. DeWitt supervised Gorelick, and Gorelick was directly accountable to DeWitt. Gorelick was expected to report to DeWitt's office on weekday mornings. DeWitt often gave instructions to plaintiff's salespeople that had to be followed, and had disciplinary power. While the manner in which Gorelick was paid favors his status as an independent contractor, plaintiff presented evidence regarding other economic reality factors that weighed in its favor. Viewing all of the evidence in a light most favorable to plaintiff, reasonable jurors could honestly have reached different conclusions on the issue whether Gorelick was an employee or independent contractor. Therefore, the trial court properly denied defendant's motions for partial directed verdict, JNOV, and new trial. See *Central Cartage Co, supra*.

Defendant next argues the trial court erred in denying its motions for JNOV and new trial because there was no evidence that Gorelick committed dishonest acts. We disagree. The EDC policy provided, in relevant part:

a. "Employee Dishonesty" in paragraph A.2, means only dishonest acts committed by an "employee", whether identified or not, acting alone or in collusion with other persons, except you or a partner, with the manifest intent to:

(1) Cause you to sustain loss; and also

(2) Obtain financial benefit (other than employee benefits earned in the normal course of employment, including: salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions) for:

(a) The "employee"; or

(b) any person or organization intended by the "employee" to receive that benefit. [Emphasis in original.]

Here, there was evidence that Gorelick committed dishonest acts under the EDC policy, including DeWitt's testimony that Gorelick defrauded several customers and personally accepted checks from the customers. Further, even if Gorelick acted in collusion with his corporation, Century, a rational jury could conclude that Gorelick would benefit from checks made payable to Century. Therefore, the trial court properly denied defendant's motions for JNOV or new trial because the evidence supported the jury's finding that Gorelick committed a dishonest act while intending to benefit himself or Century through fraud.

Defendant next argues that the trial court abused its discretion in denying defendant's motion for new trial based on excessive and unsupported damages. We disagree. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Kelly, supra*. If the verdict was within the range of the evidence, a new trial is not merited. *Means v Jowa Security Services*, 176 Mich App 466, 477; 440 NW2d 23 (1989). The burden is on the moving party to show that the verdict was excessive. *Belin v Jax Kar Wash No 5, Inc*, 95 Mich App 415, 423; 291 NW2d 61 (1980).

The jury found defendant liable to plaintiff for $64,026.03 in "actual damages" which, under the EDC policy, constituted plaintiff's "compensatory damages arising directly from a loss covered under this insurance." Defendant does not dispute that $26,500 of plaintiff's damages were proper. There was evidence, however, of other "compensatory damages arising directly from a loss covered under this insurance," including $27,168.66 plaintiff paid for the completion of four projects without a return on its performance. Evidence also indicated that plaintiff paid Gorelick $2,700 for work that was to be done on three houses and that Gorelick took plaintiff's building materials valued at $7,690.65. Therefore, evidence indicated that plaintiff's "compensatory damages arising directly from a loss covered under this insurance" totaled $64,059.31 and defendant's motion for a new trial based on excessive or unsupported damages was properly denied. See *Means, supra*. Moreover, the jury's award fell reasonably within the range of the evidence and the limits of what reasonable minds would deem just compensation; accordingly, defendant's motion for remittitur was also properly denied.

Defendant next argues that the trial court abused its discretion in refusing to instruct the jury on agency law. We disagree. "The determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion." *Stoddard v Manufacturers Nat'l*

Bank of Grand Rapids, 234 Mich App 140, 162; 593 NW2d 630 (1999). "[T]he trial court is obligated to give additional instructions when requested, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 402; 628 NW2d 86 (2001).

Here, defendant requested that the trial court instruct the jury as follows:

> The law with respect to independent insurance agents, is that they are the agent of the insured and not the insurance company. As a result, knowledge and/or disclosure by an insured to the insured's agent does not constitute disclosure or knowledge to the insurance company. Because the independent insurance agent is the agent of the insured, any statements made or materials prepared by the agent are the representative statement of the insured and are an admission by the insured.

The trial court did not abuse its discretion in refusing to give this supplemental jury instruction because the instruction was misleading. First, Williamson's status as an agent presented, at least, a question of fact. See *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 20-21; 592 NW2d 379 (1998) (an independent insurance agent is an agent of the insured is the ordinary, but not exclusive, conclusion). Second, not all statements made or materials prepared by the agent are the representative statements of the insured or are considered admissions of the insured. "It is hornbook learning that because one is an agent for one purpose he is not an agent for all." *Sherman v Korff*, 353 Mich 387, 397; 91 NW2d 485 (1958). Therefore, the trial court did not abuse its discretion in refusing to render defendant's supplemental instruction on agency.

Next, defendant argues that the trial court erred in refusing to admit an alleged party admission made by DeWitt to a client, which was contained in the client's deposition testimony from another proceeding. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A party admission is not hearsay. See MRE 801(d)(2)(A). However, deposition testimony is not excluded as hearsay if the declarant is unavailable as a witness. See MRE 804(b)(5). Here, there was no showing that the client was "unavailable" under MRE 804(a) or 804(b)(5); therefore, the deposition testimony was properly denied admission into evidence.

Finally, defendant argues that the trial court improperly admitted hearsay evidence on the issue of plaintiff's damages. Specifically, defendant argues that plaintiff's accountant was permitted to testify regarding the contents of two documentary exhibits without having personal knowledge of the particular items that were claimed to have been stolen from job sites. The trial court overruled defense counsel's hearsay objection, finding the exhibits admissible under the hearsay exception for records of regularly conducted activity, MRE 803(6). "The business records exception to the hearsay rule provides that reports or records kept in the course of a regularly conducted business activity are not to be excluded as hearsay unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness." *Price v Long Realty, Inc*, 199 Mich App 461, 467; 502 NW2d 337 (1993).

The trial court did not abuse its discretion in permitting the introduction of exhibits containing plaintiff's itemized damages because the source of information or method or circumstances of preparation did not indicate a lack of trustworthiness. The exhibits containing plaintiff's itemized damages were prepared from previous exhibits that had already been admitted as records of regularly conducted activity. The compilation of business records in preparation for trial is permissible under MRE 803(6). Regarding defendant's specific concerns over the missing job materials, plaintiff's accountant testified that there was no indication in plaintiff's records that materials from Gorelick's jobs were transferred to another job. The absence of records of the materials supports an inference that the materials were no longer in plaintiff's possession. See MRE 803(7). In particular, the materials were paid for by plaintiff, missing after Gorelick defrauded the four customers, and, according to plaintiff's records, the materials were not recaptured. Further, plaintiff's accountant testified regarding plaintiff's accounting method, which the trial court accepted as trustworthy. Therefore, the trial court did not abuse its discretion in admitting plaintiff's list of itemized damages.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra